Supreme Court, U.S.
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No. 02-717

IN THE

Supreme Court of the United States

ALISTAIR J. MACPHAIL,

Petitioner,

v.

OCEANEERING INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Oceaneering International, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. The Facts

This case concerns the validity of a forum selection provision, calling for the application of Australian law in an Australian court, in a settlement agreement negotiated and

executed in Australia and approved by a court in Australia, between an American entity, the Respondent, Oceaneering International, Inc. ("Oceaneering"), and Alistair MacPhail, a dual citizen of the United Kingdom and New Zealand, and a permanent resident of Australia ("Petitioner"), for an incident that occurred in the territorial waters of the People's Republic of China.

In May 1998, MacPhail was working as a diver for Oceaneering onboard the dive support vessel OCEAN WINSERTOR in the South China Sea, in the territorial waters of China. MacPhail alleged he was exposed to certain toxic chemicals while performing certain saturation dives related to the construction of an underwater pipeline. MacPhail alleged that he suffered permanent brain and neurological injuries as a result of the exposure.

After the incident, MacPhail returned to Australia and engaged in settlement discussions with Oceaneering's Australian solicitors. In October 1999, MacPhail accepted Oceaneering's offer of settlement and commenced a "friendly" suit in the District Court of Western Australia, Perth, under Civil Action No. 4173. On October 29, 1999, a Minute of Consent signed by MacPhail was entered in the same cause, awarding MacPhail US $280,000 under the terms of the settlement.

After the filing of that document, the parties executed a Release. MacPhail returned the executed Release to Oceaneering's solicitors under cover of letter, stating:

> I return herewith the signed settlement documents which I have considered and in respect of which *I have obtained independent legal and accounting*

> *advice*. I confirm my agreement to resolve all outstanding matters and claims with Oceaneering on the basis of the Deed of Release and Discharge and Consent Orders that I have signed.

In the Release, MacPhail: (1) released and discharged all claims against Oceaneering, including those subsequently made the basis of the underlying action; (2) agreed to indemnify Oceaneering in respect with any subsequent actions arising out of the alleged incident; (3) agreed that the Deed of Release may be pleaded as a bar to any subsequent action between MacPhail and Oceaneering; and (4) acknowledged that he read and fully understood the terms of the Deed of Release, and was afforded adequate opportunity to seek legal and other advice.

Additionally, the portion of the Release that contained the forum selection clause (clause 11), provides as follows:

> In the event of any dispute in respect of or arising from this Deed of Release and Discharge *or any matter relating thereto* the parties hereby agree to submit their dispute to the exclusive jurisdiction of the District or Supreme Court of Western Australia, or to the Federal Court of Australia and the parties hereby agree to submit to the exclusive jurisdiction of the said Courts.

Moreover, Clause 10 of the Release provides:

> This Deed of Release and discharge will be governed by and construed in accordance with the laws of Western Australia.

In consideration of the Release, Oceaneering: (1) paid MacPhail US $280,000; (2) committed to providing him with additional training courses at its expense; and (3) set an escrow fund in the amount of US $25,000 to cover any future medical expenses MacPhail might incur in respect of his alleged injuries.

On November 5, 1999, the District Court of Western Australia entered judgment based on the Consent Order between MacPhail and Oceaneering. Despite the above agreement, MacPhail brought the underlying suit in the United States District Court for the Southern District of Texas in 2001, invoking the court's admiralty jurisdiction, and claiming seaman status under 46 U.S.C. § 688.

Oceaneering filed a Motion to Dismiss, asserting that MacPhail had signed a settlement agreement releasing his claim against Oceaneering, and including a forum selection clause under the terms of which any dispute between the parties should have been litigated in a court in Western Australia under Australian law. On October 17, 2001, the district court denied Oceaneering's motion to dismiss. The district court concluded that the forum selection clause in the Release was "unreasonable and therefore unenforceable because its enforcement would violate a strong public policy and because Plaintiff would thereby be deprived of his day in court."

In January 2002, Oceaneering, Oceaneering International PTY Ltd., and Oceaneering Australia PTY Ltd. sued MacPhail in the Supreme Court of Western Australia (a proper forum under the terms of the forum selection clause) for breach of the settlement agreement. The plaintiffs in that suit maintained that MacPhail breached the settlement

agreement by filing suit in the United States, and sought specific performance of the agreement. MacPhail then moved the district court in the United States to enjoin Oceaneering from proceeding with the Australian litigation.

Oceaneering filed a Motion in Opposition to MacPhail's Motion to Enjoin, and asked the district court to reconsider its previous Order denying Oceaneering's Motion to Dismiss. On February 11, 2002, the district court issued an order that granted MacPhail's Motion to Enjoin, and denied Oceaneering's Motion for Reconsideration. Oceaneering appealed from those orders to the Fifth Circuit Court of Appeals and, given the proximate trial setting, asked the Circuit Court to expedite the appeal and stay the district court proceedings pending the outcome of the appeal. The Fifth Circuit eventually granted Oceaneering's requests for a stay and an expedited appeal and heard oral argument on June 3, 2002.

On August 7, 2002, the Fifth Circuit vacated the district court's order of February 11, 2002, dissolved the anti-suit injunction, and stayed the district court proceedings pending judgment by the Australian court. The Circuit Court held that "the district court abused its discretion when it enjoined Oceaneering" because: (1) "Oceaneering's Australian lawsuit was not vexatious" since the Australian court "had proper jurisdiction to rule on the validity of the Release;" and (2) "nothing in the record suggested MacPhail will be barred from arguing the validity of the Release and the forum selection clause in the Australian forum."

The Circuit Court also held that "federal courts must presumptively uphold forum selection clauses in international transactions" and did "conclude [that] the district court's

order denying Oceaneering's Motion to Dismiss must be vacated." Given the procedural posture of the case, the Circuit Court further held that "[i]f the Australian court grants Oceaneering's suit to enforce the prior settlement agreement made in that court, then the district court will dismiss this admiralty proceeding with prejudice." The Circuit Court's opinion is reported at 302 F.3d 274. The Petitioner thereafter filed a petition for writ of certiorari with this Court.

B. Petitioner's Misstatements

The Petitioner makes numerous misstatements in his Statement of Facts, including the following:

1. Petitioner asserts that he "was continuously poisoned by toxic chemicals while diving for Oceaneering International, Inc." (*See* Petition at p. 3). However, the statement is not based on any fact findings.

2. Petitioner also asserts that Oceaneering "continued to blatantly mislead MacPhail as to the existence of . . . medical experts." (*See* Petition at p. 5). That statement is also unsupported by any evidence as there has been no fact finding.

3. Petitioner asserts "that the United States was the only available forum" to adjudicate MacPhail's tort claims. (*See* Petition at p. 7). That statement is also unsupported by any evidence as there has been no fact finding. Moreover, even though MacPhail has offered an affidavit claiming that Australian courts

lack subject matter jurisdiction over his claims, he has not established that the United States is the only available forum, since the courts of other countries may have jurisdiction over his tort claims.

4. Petitioner makes the unsubstantiated claim that his affidavits "established the unconscionable conduct of his employer Oceaneering and its Australian attorneys to secure the seaman's release, and MacPhail's lack of mental capacity to enter into a valid agreement." (*See* Petition at pp. 7-8). These claims are also unsupported by any fact findings.

5. Additionally, Petitioner states that "Oceaneering's conduct in obtaining the Release and depriving MacPhail of necessary medical treatment and information can only be described as malicious." (*See* Petition at p. 9). However, there is no record of that before the intermediate appellate court or this Court. Indeed, an inquiry of this kind has to be undertaken by the foreign court that approved the settlement agreement and Release, which is the Australian court in this case.

6. Petitioner asserts that he "has made the showing that the [settlement] agreement was '[affected] by fraud, undue influence, or overweening bargaining power; that enforcement would be unreasonable and

unjust"; and that proceedings in the contractual forum will be so "gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court." (*See* Petition at p. 23). These claims are unsupported by any fact findings.

7. Finally, the Petitioner egregiously misquotes the Circuit Court's opinion by stating that "The Fifth Circuit's stay of the underlying claim is an acknowledgment of the claim's merits. . . ." (*See* Petition at p. 9). To the very contrary, the Circuit Court explicitly stated that:

"[W]e conclude the district court's order denying Oceaneering's Motion to Dismiss must be vacated. However, given the posture of this case, we **REMAND** this proceeding to the Southern District of Texas with instructions to hold this case in abeyance pending a judgment by the Supreme Court of Western Australia concerning the negotiated settlement. If the Australian court grants Oceaneering's suit to enforce the prior settlement agreement made in that court, then the district court will dismiss this admiralty proceeding with prejudice. If the Australian court sets aside the settlement agreement for any reason, then the district court will restore this case to its active docket and determine

> whether it has jurisdiction over MacPhail's claims under the theories asserted in his petition."[1]

REASONS FOR DENYING THE PETITION

There is no compelling reason for this Court to grant the Petition for Writ of Certiorari filed in this case. The decision below is not in conflict with any other decision of any other court on any important matter. The decision does not depart from the accepted and usual course of judicial procedure to call for an exercise of this Court's supervisory power. Moreover, the decision below does not decide an important question of federal law that should be settled by this Court, and does not in any way conflict with relevant decisions of this Court.

More specifically, the Petition should be denied because: (1) the court below applied the proper analysis in reviewing a forum selection clause in an international contract and in reviewing the propriety of an anti-suit injunction; and (2) addressed all of the arguments put before it.

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1. *MacPhail v. Oceaneering Int'l, Inc.*, 302 F.3d 274, 278 (5th Cir. 2002).

I. THE PROPER ANALYSIS IN REVIEWING A FORUM SELECTION CLAUSE IN AN INTERNATIONAL CONTRACT AND IN REVIEWING THE PROPRIETY OF AN ANTI-SUIT INJUNCTION WAS APPLIED. (Addressing Point I, pp. 14-23).

The proper analysis was applied in reviewing a forum selection and choice of law clause in an international contract, and in reviewing the propriety of an anti-suit injunction for at least four reasons: (1) the general rule is that forum selection clauses are presumptively valid; (2) there is no authority, nor is there any valid public policy reason, to dispute the enforceability of forum selection clauses in settlement agreements involving injured seamen; (3) the suit Oceaneering instituted in the court of Western Australian, seeking specific performance of the settlement agreement was neither oppressive nor vexatious; and (4) prohibiting Oceaneering from proceeding with its lawsuit in Australia was against this Court's jurisprudence because the Australian court (the proper forum under the forum selection clause) was effectively prevented from adjudicating a dispute properly pending before it.

A. Forum Selection Clauses Are Presumptively Valid (Addressing pp. 15-22 of the Petition).

For over a quarter century, this Court has consistently held that forum selection clauses are presumptively valid.[2]

2. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595, 111 S. Ct. 1522, 1528, 113 L. Ed. 2d 622, 633 (1991) (forum selection clause in a passenger cruise ticket held to be enforceable in a bodily injury case even though the passenger did not negotiate provision as (Cont'd)

This presumption may be overcome only upon a showing that a forum selection provision is unreasonable. As noted by this Court, the burden of proving unreasonableness is heavy and requires a showing that the clause results from fraud or overreaching; that it violates a strong public policy; or that enforcement of the clause deprives the plaintiff of his day in court.[3] Allegations that the entire contract was procured by fraud or overreaching are inappropriate to a court's forum selection clause enforceability determination.[4] Instead, this Court has instructed American courts to enforce forum selection and choice of law clauses in the interest of international comity and out of deference to the integrity and proficiency of foreign courts.[5]

Petitioner failed to overcome the presumption of the validity of the forum selection clause because: (1) he could not show that Oceaneering procured the forum selection

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(Cont'd)
it was contained in a form contract); *M/S BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13, 92 S. Ct. 1907, 1914-15, 32 L. Ed. 2d 513, 521-22 (1973) (forum selection clause in towing contract between American company and Italian company calling for court in London to hear case was held to be valid). The Fifth Circuit decision was also consistent with its holding in *Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298, 301 (5th Cir. 1998).

3. *Mitsui & Co. (USA), Inc. v. MIRA M/V*, 111 F.3d 33 (5th Cir. 1997) (citing *M/S BREMEN*, 407 U.S. at 12-13, 92 S. Ct. at 1914-17, 32 L. Ed. 2d at 521-22)).

4. *Haynsworth v. The Corporation*, 121 F.3d 956, 964 (5th Cir. 1997).

5. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

clause by fraud or overreaching; (2) the clause did not violate the public policy of the United States; and (3) enforcement of the clause would not prevent the Petitioner from having his day in court.

First, in the absence of evidence, Petitioner attempted to string together a chain of inferences in an effort to paint a picture of fraud. However, the Circuit Court explained that Petitioner's argument was foreclosed by binding precedent in the Circuit and by the policies underlying the presumption in favor of enforcing forum selection clauses.[6] Moreover, the district court specifically "decline[d] to set aside the clause on the basis of fraud or overreaching by Oceaneering."[7]

Second, the clause did not violate the public policy of the United States. The Circuit Court declined to accept Petitioner's position that the policy of protecting seamen as "wards of the court" overrides the policy behind enforcing forum selection clauses. The Petitioner relies on *Castillo v. Spiliada Mar. Corp.*,[8] to argue that there is "a strong policy favoring the protection of seamen [that] is deeply entrenched in our legal system," and "federal courts must remain vigilant in protecting the rights of seamen, whether foreign or domestic, in their relations with their employer."[9]

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6. *MacPhail*, 302 F.3d at 277-78 (citing *Haynsworth*, 121 F.3d at 962).

7. *MacPhail v. Oceaneering Int'l, Inc.*, 170 F. Supp.2d 718, 727 (S.D. Tex. 2001), *vacated and remanded*, 302 F.3d 274 (5th Cir. 2002).

8. 937 F.2d 240, 247 (5th Cir. 1991).

9. Citing *Castillo*, 937 F.2d at 241.

The Petitioner's reliance on *Castillo* is misplaced because that case did not involve the enforcement of a forum selection clause, but a wrongful discharge and breach of contract claim that several seamen brought under 46 U.S.C. § 10313, the Seamen's Wage Statute.[10] As a result, the *Castillo* Court did not address the policy arguments supporting the enforcement of forum selection clauses that are so crucial here, and its holding is inapplicable to this case.

Finally, as the Circuit Court held, MacPhail already has an available forum in Australia where he can appear and have his day in court with respect to the overriding issue of the enforceability of the release.[11] Thus, the Circuit Court's opinion did not vary from the analysis used by this Court in *M/S BREMEN v. Zapata Off-Shore Co.*[12] For these reasons, the forum selection clause is enforceable, and the Petitioner's contrary argument must be rejected.

B. The Anti-Suit Injunction Was Properly Dissolved (Addressing pp. 22-23 of the Petition).

Petitioner argues that the injunction issued by the district court prohibiting the prosecution of the Australian action should have been affirmed. (*See* Petition at p. 23). When deciding whether a district court properly enjoined a party from proceeding with foreign litigation, courts consider whether the foreign litigation is vexatious or oppressive.[13]

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10. *Castillo*, 937 F.2d at 241.

11. *MacPhail*, 302 F.3d at 278 ("nothing in the record suggests MacPhail will be barred from arguing the validity of the Release and the forum selection clause in the Australian forum.").

12. 407 U.S. 1, 12-13, 92 S. Ct. 1907, 1914-15, 32 L. Ed. 2d 513, 521-22 (1973).

13. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626 (5th Cir. 1996); *Bethell v. Peace*, 441 F.2d 495, 498 (5th Cir. 1971).

The Australian litigation is not vexatious or oppressive to the Petitioner because: (1) Petitioner is a permanent resident of Australia who was sued in the courts of his country of residence; (2) by an American entity and its foreign independent subsidiaries; (3) over an agreement that was entered into in Australia, which was performable in Australia, and which was approved by an Australian Court.

As the court below held, "the District Court of Western Australia established prima facie jurisdiction when it approved the Release and the settlement between Oceaneering and MacPhail long before the Southern District of Texas enjoined Oceaneering from proceeding with its lawsuit in Australia."[14] Accordingly, the district court was not required to issue the injunction to protect its jurisdiction, and abused its discretion by doing so.[15]

Finally, Petitioner argues that by holding that "federal courts must presumptively uphold forum selection clauses in international transactions," the Circuit Court violated a strong public policy and deprived the Petitioner of his day in court. (*See* Petition at p. 15). Petitioner ignores the fact that the presumption in favor of forum selection clauses is the well-settled law created by this Court and that the court below simply followed binding precedent in reaching its decision. Rather than being in conflict with the decisions of this Court or other Courts, the decision below is in harmony with binding precedent.

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14. *MacPhail*, 302 F.3d at 278.

15. *MacPhail*, 302 F.3d at 278.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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